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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GEORGE HERNANDEZ, Defendant and Appellant.	B283270 (Los Angeles County Super. Ct. No. KA110022)

APPEAL from a judgment of the Superior Court of Los Angeles County. Juan Carlos Dominguez, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

George Hernandez (defendant) stands convicted of second degree murder for stabbing his roommates' friend 41 times. In this appeal, he argues that the trial court should have given the jury a special defense-of-home instruction applicable to intruders and that the defense-of-home instruction the jury heard improperly shifted the burden of proof onto him. These arguments lack merit, so we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On a Wednesday evening in late June 2015, someone stabbed Daniel Herrera (Herrera) 41 times in the head, chest, arms, and legs; three of the wounds were fatal.

The stabbing occurred in one of the trailers at the Thunderbird Trailer Park in Pomona, California. The trailer was owed by Cece Arenas (Cece).[1] Cece, her adult daughter Danielle, and defendant each occupied a room in the trailer.

Both Cece and Danielle were friends with Herrera, and Herrera would regularly drop by the trailer. On the night in question, Herrera "walked in" to the trailer and knocked on Danielle's bedroom door to let her know he was there before going back to the living room.

At some point thereafter, Danielle heard a scuffle in the living room. When she investigated, she saw someone standing over Herrera as Herrera sat on the sofa. She yelled "Stop!" and hit the assailant with a floor lamp and then the television. She then tried to pull the assailant away, but he sliced her hand with a knife. Cece then came out to the living room and whacked the

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[1] Because Cece and Danielle share the same last name, we use their first names for clarity. We mean no disrespect.

assailant with her walking cane. At that point, the assailant fled.

Overwhelming evidence established that defendant was Herrera's assailant. A six-inch fixed blade knife with Herrera's blood on it was recovered outside the apartment where defendant's ex-girlfriend lived, and whom he had gone to visit right after the stabbing. When defendant was arrested that night for violating the restraining order to keep away from his ex-girlfriend, Herrera's blood was on his hands as well as on the shorts, t-shirt, and knife sheath he was wearing. Danielle's blood was also on his shorts and on a tank top. What is more, both Cece and Danielle had told police that defendant was the assailant.

II. Procedural Background

The People charged defendant with a single count of murder (Pen. Code, § 187, subd. (a))[2] and alleged that he had personally used a deadly and dangerous weapon (namely, a knife) (§ 12022, subd. (b)(1)). The People further alleged that defendant's two 1987 first degree burglary convictions constituted strikes within the meaning of our "Three Strikes" law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)); that one of those convictions constituted a prior "serious" felony (§ 667, subd. (a)); and that defendant had served four other prior prison terms (§ 667.5, subd. (b)(1)).

At trial, Cece and Danielle were both in custody for refusing to testify. Both recanted their prior statements identifying defendant: Danielle said she could not identify the "dark shadow[y] figure" who had attacked Herrera, and Cece

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

went so far as to say she did not know defendant at all.

Defendant took the stand. He said that someone had "socked [him] in the eye" the moment he entered the trailer that night, and defendant "just started fighting" and went "wild" because he feared the Mexican Mafia was making good on its 2003 threat to kill him. He explained his "life was in danger" because six people—Herrera, Danielle, Cece, and three others—were attacking him at the same time.

The trial court instructed the jury on the charged crime of second degree murder, on the lesser included crime of voluntary manslaughter (as the product of "a sudden quarrel or in the heat of passion" as well as due to imperfect self-defense), on self-defense, and on defense of one's home.

The jury found defendant guilty of second degree murder and found the weapon enhancement to be true. Defendant subsequently admitted his prior convictions.

The trial court sentenced defendant to prison for 55 years to life, comprised of a base sentence of 45 years (15 years to life, tripled due to the two prior strikes), plus one year for the weapon enhancement, plus five years for the prior serious felony, and plus four years (one for each prior prison term).

Defendant filed this timely appeal.

DISCUSSION

In this appeal, defendant contends that the trial court erred (1) in not instructing the jury that a person who uses deadly force against an intruder within his residence is "presumed to have held a reasonable fear of imminent peril of death or great bodily injury," and (2) in not modifying CALCRIM No. 506. Defendant did not bring either claimed error to the trial court's attention. However, we will ignore any forfeiture

(§ 1259),[3] and will independently review the correctness of the trial court's instructions (*People v. Simon* (2016) 1 Cal.5th 98, 132-133).

I. Sua Sponte Duty to Instruct on Presumption

A homicide is justified "[w]hen committed in defense of habitation . . . ." (§ 197, subd. (2).) The Home Protection Bill of Rights, enacted in 1984, made this defense easier to prove by erecting a rebuttable presumption that "[a]ny person using force intended or likely to cause death or great bodily injury within his or her residence" will be "presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household" under certain circumstances. (§ 198.5; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494-1495 (*Brown*).) The only circumstances in which this presumption applies, however, is where: (1) there was "an unlawful and forcible entry into a residence"; (2) "the entry [was] by someone who is not a member of the family or the household"; (3) the defendant "used 'deadly' force . . . against the [intruder] within the residence"; and (4) the defendant had "knowledge of the unlawful and forcibly entry." (*Brown*, at pp. 1494-1495; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1361-1362; § 198.5.) The presumption's limitations reflect its purpose, which is "to permit residential occupants to defend themselves from intruders without fear of legal repercussions." (*People v. Owen* (1991) 226 Cal.App.3d 996, 1005; *People v. Grays* (2016) 246 Cal.App.4th 679, 688 ["The bill was specifically discussed in the context of protection against burglars"].)

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[3] In so doing, we obviate defendant's claim that his counsel was constitutionally ineffective for not objecting on these grounds.

A trial court's duty to give a particular defense instruction when there has been no request to do so turns on whether: (1) there is substantial evidence supporting that instruction; and (2) the instruction is not inconsistent with the defendant's theory of the case. (*People v. Townsel* (2016) 63 Cal.4th 25, 58; *People v. Abilez* (2007) 41 Cal.4th 472, 517.) In assessing substantial evidence for these purposes, we construe the record in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

The trial court did not violate its duty to instruct in this case. That is because substantial evidence did not support at least one of the four prerequisites to the applicability of the homeowner's presumption—namely, the requirement that the homicide victim be someone who made an "unlawful and forcible entry" into the residence. (§ 198.5; *Brown*, *supra*, 6 Cal.App.4th at pp. 1494-1495.) Both Cece and Danielle testified that Herrera was their friend and a welcome guest in their mobile home, and Danielle testified that Herrera was present inside the mobile home with her permission the night he was killed. Defendant's testimony did not in any way touch on *how* the person who attacked him had entered the mobile home. Consequently, the only evidence in the record indicates that Herrera had *not* made "an unlawful [or] forcible entry" into the mobile home. A defense instruction premised on the opposite was inapplicable.

Defendant offers two arguments in response. First, he asserts that it should be enough that he *reasonably believed* his assailant was an intruder who had made an unlawful and forcible entry into the home. This assertion ignores the plain language of section 198.5 and the cases interpreting it, all of which require

both the fact of an unlawful and forcible entry *and* the defendant's knowledge of or reasonable belief in that fact. (§ 198.5; *Brown*, *supra*, 6 Cal.App.4th at pp. 1494-1495.) Second, defendant urges that the presumption should apply even when the entry was not "forcible" as long as it was "unlawful," and here, defendant continues, Herrera's entry into the trailer earlier that evening was unlawful because it was made with the intent to do defendant harm. This argument asks us to ignore the plain language of section 198.5, which requires proof of an "unlawful and forcible" entry. (§ 198.5) This we cannot do. (*Melissa R. v. Superior Court* (2012) 207 Cal.App.4th 816, 822 [""Appellate courts may not . . . rewrite the clear language of [a] statute to broaden the statute's application"""].) A "forcible entry" is one "with strong hand with unusual weapons, or with menace of life or limb." (*McMinn v. Bliss* (1866) 31 Cal. 122, 126-127.) No evidence supports a finding that Herrera's entry was effected in such a manner; to the contrary, Herrera's entry was with the blessing of both the trailer's owner and its only other occupant at the time of entry.

II. Failure to Modify General Habitation Instruction

A. *Pertinent Facts*

With respect to defense of home, the trial court gave CALCRIM No. 506, which provides that a defendant is "not guilty of murder or manslaughter if he killed to defend himself in [his] home" if:

"1. The defendant reasonably believed that he was defending a home against . . . Herrera, *who intended to or tried to commit great bodily harm or murder*;

"2. The defendant reasonably believed that the danger was imminent;

"3. The defendant reasonably believed that the use of deadly force was necessary to defend against the danger; AND

"4. The defendant used no more force than was reasonably necessary to defend against the danger." (Italics added.)

That instruction further explained that "[t]he People have the burden of proving beyond a reasonable doubt that the killing was not justified."

B. *Analysis*

Defendant argues that the trial court's failure to omit the italicized language effectively placed the burden on him to prove *Herrera's* specific intent, which he claims violates both due process and the Sixth Amendment.

We reject this argument. "In reviewing [a] purportedly erroneous instruction[], 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*People v. Frye* (1998) 18 Cal.4th 894, 957, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) We conclude that there is no reasonable likelihood that the jury read the italicized language to require defendant to prove Herrera's specific intent because (1) the instruction makes clear that *the People* have the burden of disproving any defense of justification, including disproving each element of such a defense, and (2) the italicized language refers to whether the victim "intended to *or* tried to commit great bodily harm or murder," and its use of "or" means that an attempt is sufficient regardless of intent.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST